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## DISPENSING JUSTICE IN A MINORITY CONTEXT: THE JUDICIAL ADMINISTRATION OF UPPER EGYPT UNDER MUSLIM RULE IN THE EARLY EIGHTH CENTURY

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The early Islamic judicial system can be reconstructed from narrative texts that were definitively fixed either during the last quarter of the ninth century or the tenth century. Literature specialising in judicial history such as the semi-biographical genre of *akhbār al-quḍāt* assumed its definitive shape during the post-*miḥna* period, when the victory of Sunnism progressively imposed new political and institutional order. In this literature, *qāḍīs* appear as main representatives of Islamic law in a Muslim context while other religious groups remain underrepresented.<sup>1</sup> However, documentary sources dating from earlier periods challenge this picture. Administrative papyri, originating mostly from Upper Egypt, describe judicial instances where provincial governors play a major role. Although these papyri paint an inconclusive picture of the early Islamic judicial system, they nevertheless offer illuminating insights about the actual judicial practice.

In what follows, I shall examine excerpts from judicial letters of Qurra b. Sharīk, Umayyad governor of Egypt from 90/709 to 96/714.<sup>2</sup> Although most of these letters were published decades ago, I believe they still merit a detailed contextual study within the historical framework of the Umayyad legal administration. The letters concern correspondence between Qurra and Basilios, pagarch of Aphroditō. Only letters addressed by Qurra to Basilios survive. Amongst the numerous papyri discovered in the early twentieth century,<sup>3</sup> ten or so were of a “judiciary” nature, dealing with instructions from the governor to Basilios regarding lawsuits.

Qurra’s letters date from the middle of the Umayyad period when Muslim people remained a numerical minority in the predominantly Christian Egyptian province. In Egypt, Umayyad governors relied on an administrative structure which can loosely be described as an extension

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I am grateful to Robert Hoyland and Marie Legendre for their useful comments on a previous version of this paper. It goes without saying that remaining mistakes are mine alone.

<sup>1</sup> There are however some exceptions. See M. Tillier, “La société abbasside au miroir du tribunal,” *Annales Islamologiques*, 42 (2008), 166-8.

<sup>2</sup> On Qurra b. Sharīk, see al-Kindī, *Ta’rīkh Miṣr wa-wulāti-hā*, in *Kitāb al-wulāt wa-kitāb al-quḍāt*, éd. R. Guest (Leiden: Brill, 1912), 63-66; C.E. Bosworth, « Qurra b. Sharīk », in *EP*, 5: 500; H. Lammens, “Un gouverneur omayyade d’Égypte. Qurra ibn Sharīk d’après les papyrus arabes,” *Bulletin de l’Institut d’Égypte*, 5<sup>e</sup> série, tome II (1908), 99-115; N. Abbott, *The Qurrah Papyri from Aphroditō in the Oriental Institute* (Chicago: The University of Chicago Press, 1938), 66 sq; J. b. Kh. Abū Ṣafya, *Bardiyyāt Qurra b. Sharīk al-‘Absī. Dirāsa wa-taḥqīq* (Riyad: Markaz al-Malik Fayṣal li-l-buḥūth wa-l-dirāsāt al-islāmiyya, 2004), 27-57.

<sup>3</sup> On the discovery of this collection of papyri, see H.I. Bell, “The Aphroditō Papyri,” *The Journal of Hellenic Studies* 28 (1908), 97-98; N. Abbott, *The Qurrah Papyri from Aphroditō in the Oriental Institute* (Chicago: The University of Chicago Press, 1938), 6. Although Qurra’s judicial papyri have been known for long decades, they have never been the subject of any significant, detailed study. See for example E. Tyan, *Histoire de l’organisation judiciaire en pays d’Islam* (Leiden: Brill, 1938-43), I, p. 133, who dedicates only a few lines to these letters.

of the Byzantine system. Egyptian territory was divided into eparchies and pagarchies. Each of the five eparchies was ruled by a *dux* (ar. *amīr*), whose main remit was fiscal administration. These *dux* presided over the pagarchs (ar. *ṣāhib*), who numbered between 50 to 60 within the Egyptian province. Pagarchs ruled towns and the surrounding territory.<sup>4</sup> Although Muslims represented only a small minority of the population, they occupied dominant positions within the society. The ruling classes were not assimilated into the previous local political and social order. The Muslims in fact succeeded in forming a new social structure whereby the numerical majority – the conquered Christian population – was eventually reduced to that of a minority. Even though Christians represented a large majority of the Egyptian population for many centuries, they soon became a political minority, marginalised by their status of “protected people”, or what classical *fiqh* eventually defined as the status of *dhimma*.

In this paper, I will draw on Qurra’s judicial letters to examine the judicial role played by Muslim authorities amongst the conquered Egyptian population. I will attempt to demonstrate how the numerical Christian majority was reduced to a political minority through judicial interventions described in documentation from the early eighth century. I shall present a hypothetical reconstruction of the judicial procedure described in these letters and propose provisional conclusions about the influence of early Islamic concepts on the development of the judiciary within a Christian environment.

## **1. Why did a Muslim governor write letters to a Christian pagarch? Preliminary indications about early Islamic judicial procedure**

### *1.1. Typology of legal cases*

Qurra b. Sharīk’s letters concern complaints brought before him by litigants. I will first examine cases by type before examining the litigants’ position within the procedure. Qurra’s correspondence to Basilios reveals two types of cases:

(1) Debts. Certain letters deal with complaints about a non-payment of debts. As in other civilisations, this situation was commonplace in early Islam to the extent that debt cases became paradigmatic examples of lawsuits in Islamic law. The most interesting aspect is the sums involved in these debt cases. The sums range from between 10 ½ dinars<sup>5</sup> and 18 dinars claimed from a priest<sup>6</sup> to 23 ⅓ dinars owed by a peasant.<sup>7</sup> For comparative purposes, marriage contracts written in Egypt between the second/eighth and the fifth/eleventh centuries mention dowers (*ṣadāqs*) ranging between 2 and 10 dinars. In al-Ushmūnayn, a small house for a couple cost 4 or 5 dinars.<sup>8</sup> These debts were thus exceptionally high amounts, particularly given the rural or semi-rural environment.

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<sup>4</sup> C. Foss, “Egypt under Mu‘āwiya. Part I: Flavius Papas and Upper Egypt,” *BSOAS* 72 (2009), 2-3; K. Morimoto, *The Fiscal Administration of Egypt in the Early Islamic Period* (Kyoto: Dohosha, 1981), 195-96; P. Sijpesteijn, “Landholding Patterns in Early Islamic Egypt,” *Journal of Agrarian Change* 9 (2009), 121.

<sup>5</sup> P.Heid.Arab. I n°3 = Abū Ṣafya n°29.

<sup>6</sup> P.Heid.Arab. I n°10 = Abū Ṣafya n°32.

<sup>7</sup> P.Cair.Arab. III n°154 = Grohmann, *Arabic Papyri*, 129 = Abū Ṣafya n° 28. See also P.Qurra n° 3 = Abū Ṣafya n°31, where more than 10 dinars are mentioned (units disappeared from the papyrus).

<sup>8</sup> Y. Rapoport, “Matrimonial Gifts in Early Islamic Egypt,” *Islamic Law and Society* 7 (2000), 14-15.

(2) Usurpation or misappropriation, usually by powerful people – what classical *fiqh* called *ghaṣb*.<sup>9</sup> In one letter a man complains about “unfair” (*ẓulman*) appropriation of an unknown amount of money (in dinars) by someone, possibly the head of a village.<sup>10</sup> In another papyrus, the plaintiff denounces the *māzūt* (leader) of his village, who occupies the former’s house through unlawful entry.<sup>11</sup> As in the above, these disputes concern expensive goods or significant sums of money.

## 1.2. The litigants

As in conventional accusatory procedure, Qurra b. Sharīk’s letters mention two categories of litigants: plaintiffs and defendants. There is, however, a clear distinction in the way these two categories are mentioned. Plaintiffs are always nominally identified by their name (*ism*) and by the first generation of their genealogy (*nasab*): Ibshādah b. Abnīla,<sup>12</sup> Marqus b. Jurayj,<sup>13</sup> Baqtar b. Jamūl,<sup>14</sup> Yuḥannis b. Shanūda,<sup>15</sup> and Dāwūd b. Baddās.<sup>16</sup> They are all Christians and sons of Christians. The only exception is papyrus P.Heid.Arab. I n°11, in which the plaintiff is identified by pronoun “*man*” (someone). As the papyrus did not survive intact and the preserved fragment begins precisely at this point, it is possible that the plaintiff was nominally identified in the preceding sections.<sup>17</sup>

On the other hand, names of defendants do not appear systematically. Most often, the defendant is only identified as “a peasant/peasants (*nabaṭī/anbāṭ*) of such a district (*kūra*)”.<sup>18</sup> Seven papyri mention litigants, but only two cite the names of defendants: Anbā Ṣalm, a priest,<sup>19</sup> and M[īnā], who is most likely to be the head of a village according to Becker and Abū Ṣafya’s interpretation.<sup>20</sup> We may therefore conclude that these defendants were nominally identified only when they were high-ranking people or notables. In another papyrus, however, a defendant who may well be the head of a village (*[māzū]t*, read *[marū]t* by Abū Ṣafya) is mentioned without being nominally identified.<sup>21</sup>

The apparent difference in the way plaintiffs and defendants were treated may offer a clue regarding Islamic judicial procedures in Qurra’s time. The rare nominal identification of defendants could either mean that the governor did not systematically know their names, or,

<sup>9</sup> See O. Spies, “*Ghaṣb*,” in *EL*<sup>2</sup>, 2: 1020.

<sup>10</sup> P.Heid.Arab. I n°11 = Abū Ṣafya n°33.

<sup>11</sup> C.H. Becker, “Arabische Papyri des Aphroditofundes,” *Zeitschrift für Assyriologie* 20 (1906), 74-75 = Abū Ṣafya n°34. To these papyri should also be added papyrus Sorbonne Inv. 2346 (published by Y. Rāḡib “Lettres nouvelles de Qurra b. Šarīk,” *Journal of Near Eastern Studies* 40 (1981), 183-5), although this last papyrus is very damaged and if it could indeed be a judiciary letter, the content has almost completely disappeared.

<sup>12</sup> P.Qurra n°3 = Abū Ṣafya n°31.

<sup>13</sup> P.Heid.Arab. I n°3 = Abū Ṣafya n°29; P.Cair.Arab. III n°154 = Grohmann, *Arabic Papyri*, 129 = Abū Ṣafya n°28. However, “Jurayj” disappeared from this last papyrus, and it could be a reference to someone else. If it is indeed the same person, this means that he brought a complaint twice in the same month, each time to ask for the repayment of a peasant’s debt.

<sup>14</sup> P.Cair.Arab. III n°155 = Abū Ṣafya n°30.

<sup>15</sup> P.Heid.Arab. I n°10 = Abū Ṣafya n°32.

<sup>16</sup> C.H. Becker, “Arabische Papyri des Aphroditofundes,” 74-75 = Abū Ṣafya n°34.

<sup>17</sup> P.Heid.Arab. I n°11 = Abū Ṣafya n°33.

<sup>18</sup> P.Cair.Arab. III n°154 = Abū Ṣafya n°28 = Grohmann, *Arabic Papyri*, 129; P.Heid.Arab. I n°3 = Abū Ṣafya n°29; P.Cair.Arab. III n°155 = Abū Ṣafya n°30; P.Qurra n°3 = Abū Ṣafya n°31.

<sup>19</sup> P.Heid.Arab. I n°10 = Abū Ṣafya n°32.

<sup>20</sup> P.Heid.Arab. I n°11 = Abū Ṣafya n°33.

<sup>21</sup> C.H. Becker, “Arabische Papyri des Aphroditofundes,” 74-75 = Abū Ṣafya n°34.

that their precise identity was of secondary importance. If both the plaintiff and the defendant had appeared at the governor's court, this difference in identification would not have occurred. We may thus conclude that the defendant rarely made an appearance before Qurra. The governor was presumably more in direct contact with only the plaintiff, who was often a notable with sufficient material means to refer his complaint to Fustāt.<sup>22</sup> If this hypothesis is correct, it provides us with an insight on the judicial procedure predating the governor's correspondence with the pagarch. Absence of the defendant's identity in the papyri and his presumed absence at the governor's court indicate that the actual lawsuit did not take place. What is likely is that the written instructions of Qurra b. Sharīk did not concern lawsuits that he had already presided over but dealt with future proceedings. The governor identified the plaintiff to the pagarch solely for administrative reasons. The address preserved on the back of one of his letters (P.Qurra n°3 = Abū Šafya n°31) serves to confirm this hypothesis. On the second line, after the name of the sender and the addressee, the scribe has added the following: "with regard to Ibshādah b. Abnīla [and his complaint against] a peasant (*[fī] Ibshādah b. Abnīla fī nabaṭ[ī]*)". This suggests that the plaintiff's name served as reference for the dispute, possibly for registration purposes of the administration.

If these correspondences do not describe judgements of actual lawsuits but concern instructions of judicial proceedings, it is understandable why there was no importance attached to the identification of defendants. The plaintiff would conventionally be required to mention the identity of his adversary in lawsuits in front of the pagarch. The exception, however, was where the defendant was a high-ranking person not likely to be summoned to court. We may surmise that the identification of the defendant to the governor and the pagarch would have given more authority to the latter in summoning the defendant. In instances where the defendant was an ordinary peasant, oral identification by the plaintiff before the pagarch would have been sufficient.<sup>23</sup> The conclusion therefore is that Qurra b. Sharīk's judicial letters were most likely written to initiate proceedings that were presided over by a pagarch. This hypothesis is confirmed by some details of the procedure as reflected by Qurra's letters.

## 2. Judicial procedure in the presence of Qurra b. Sharīk

### 2.1. An "appeal" to the governor?

Qurra's letters indicate that he had been in prior contact with the plaintiff. The nature of this contact remains uncertain, as the governor's letters only make a standard mention of it with the expression "such and such a plaintiff informed me that (*akhbara-nī anna*)...".<sup>24</sup> The verb "*akhbara*", which was later used in religious, historical and *adab* literature to indicate the transmission of a narrative, suggests that the plaintiff made the complaint orally: for example during an audience with the governor. However, Nabia Abbott has highlighted ambiguities

<sup>22</sup> See P.M. Sijpesteijn, *Shaping a Muslim State. The World of a Mid-Eighth-Century Egyptian Official* (Oxford: Oxford University Press, 2013), 156.

<sup>23</sup> Regarding the identification of litigants in later periods, see M. Tillier, "L'identification en justice à l'époque abbasside," *Revue des Mondes Musulmans et de la Méditerranée* 127 (2010), 99-101.

<sup>24</sup> P.Qurra n°3 = Abū Šafya n°31; P.Cair.Arab. III n°154 = Abū Šafya n°28 = Grohmann, *Arabic Papyri*, 129; P.Heid.Arab. I n°3 = Abū Šafya n°29; P.Cair.Arab. III n°155 = Abū Šafya n°30; P.Heid.Arab. I n°10 = Abū Šafya n°32.

concerning the usage of this verb, particularly in the context of an *isnād*. Although the expression denotes oral transmission, it can also refer to written communication within a literate society.<sup>25</sup> Since written petitions to governors began to appear in papyri documents from the third/ninth century onward, we cannot rule out the hypothesis that plaintiffs from the early eighth century may have submitted their complaints to Qurra b. Sharīk in a written form.

The main question, however, is not how the plaintiff submitted his complaint, but rather the significance of this complaint to the governor and its function within the judicial process. I have argued in the preceding paragraphs that an encounter between the plaintiff and the governor may not have occurred during a lawsuit presided over by the governor. The lawsuit may well have taken place *after* the dispatch of the letter to the pagarch, which explains the prescriptive nature of the correspondence. What then was the course of events *before* the encounter? Had a lawsuit been raised? In other words, had the governor been solicited for proceedings that had already been initiated? Or did the claimant “appeal” against a decision that had already been issued?

Qurra b. Sharīk’s letters do not refer to a previous lawsuit. In identifying the plaintiff, a recurring expression appears in the correspondence: “the [plaintiff] claims (*yaz ‘amu*) that [his adversary] deprived him of his right/due (*anna-hu/hum ghalaba-hu/ghalabū-hu ‘alā ḥaqqi-hi*)”.<sup>26</sup> The verb “*ghalaba*”, which carries the meaning “to overcome”<sup>27</sup> could initially be understood as referring to a previous lawsuit in which the plaintiff had been “overcome” by his adversary who had unlawfully appropriated his right. This interpretation is however difficult to prove; it is more likely that the expression “*ghalaba ‘alā ḥaqqi-hi*” simply refers to the fact that a debtor unduly appropriated the money borrowed from the plaintiff (i.e. his due). Two extracts from Qurra’s letters seem to confirm this second hypothesis:

(1) As to the matter in hand. Marqus b. [Jurayj] has informed me that he has to demand of a peasant (*nabaṭī*) from among the people of thy district (*kūra*) twenty-three dinars and a third of a dinar. He says that the peasant has died and that [another] peasant from among the people of his village has appropriated his money (i.e. that of the dead peasant?<sup>28</sup>), thus *depriving him of his due*...<sup>29</sup>

(2) As to the matter in hand. Marqus b. Jurayj has informed me that a peasant from among the people of thy district owes him ten dinars and a half, and he claims that *he deprived him of his due*...<sup>30</sup>

<sup>25</sup> N. Abbott, *Studies in Arabic Literary Papyri* (Chicago: The University of Chicago Press, 1967), II, 63.

<sup>26</sup> P.Cair.Arab. III n°154 = Abū Ṣafya n° 28 = Grohmann, *Arabic Papyri*, 129; P.Heid.Arab. I n°3 = Abū Ṣafya n°29; P.Cair.Arab. III n°155 = Abū Ṣafya n°30; P.Qurra n°3 = Abū Ṣafya n°31; P.Heid.Arab. I n°10 = Abū Ṣafya n°32.

<sup>27</sup> See A. de B. Kazimirski, *Dictionnaire Arabe-Français* (Beirut: Librairie du Liban, s.d.), II, “*gh.l.b*”.

<sup>28</sup> The ambiguity arises from the possessive pronoun “-*hu*” which could also refer to the creditor in “*akhadha māla-hu*”.

<sup>29</sup> P.Cair.Arab. III n°154 = Abū Ṣafya n° 28 = Grohmann, *Arabic Papyri*, 129. Translation by A. Grohmann, *Arabic Papyri in the Egyptian Library, vol. III, Administrative Texts* (Cairo: Egyptian Library Press, 1938), III, 31-2, with revisions.

<sup>30</sup> P.Heid.Arab. I n°3 = Abū Ṣafya n°29. Cf. P.Qurra n°3 = Abū Ṣafya n°31; P.Heid.Arab. I n°10 = Abū Ṣafya n°32.

In the first excerpt, the plaintiff's adversary has appropriated the debt of the dead debtor, possibly though inheritance, and refused to give back the money to the creditor. Likewise, in the second excerpt, the expression "*ghalaba 'alā ḥaqqi-hi*" seems to refer to the refusal by the debtor to repay his debt rather than referring to a previous infringement. The expression could therefore be an emphatic allusion, to the harm suffered by the plaintiff who had been "overcome" by his adversary.

It must be stressed that the expression "*ghalaba 'alā ḥaqqi-hi*" only appears in cases involving debt. In cases of usurpation or misappropriation, a different expression is employed: "*zulman bi-ghayri ḥaqq*".

(3) Someone [came] and informed me that M[īnā, the head of his village, took from him the sum of ... (number below 10)] dinars (*dan[ā]nīr*) in an unjust manner and without any right (*zulman bi-ghayri [ḥaqq]*).<sup>31</sup>

(4) Dāwūd b. Baddās has informed me [that the *māzū*]t of his village settled in his house with members of his family and some of his belongings, in an unjust manner [and without any right] (*zulman [bi-ghayri ḥa]qq*).<sup>32</sup>

This expression undoubtedly describes the wrongs committed by the defendant. It cannot allude to the outcome of a previous lawsuit. We can safely conclude that in cases of usurpation, letters to the pagarch do not contain allusions to a lawsuit that could have occurred in the pagarch's court before the complaint was raised with the governor. It seems therefore reasonable to suppose that there were no previous lawsuits concerning usurpations, and likewise concerning debts. At this point, we can exclude the hypothesis that the plaintiff lodged an appeal before the governor of Fustāt against a judgment previously passed by the pagarch. The plaintiff certainly "appealed" to the governor (in a non-technical sense), perhaps by way of petition, but this appeal was probably part of the original trial, or proceedings in the first instance.

## 2.2. The subject of the letters

### *Production of proof*

If the governor did not preside over an appeal court, we still have to determine his role within the procedure. When Qurra b. Sharīk was called on by plaintiffs, he always sent the same type of instructions to the pagarch. According to the letters, it was incumbent on the pagarch to pass judgement on cases submitted by the plaintiff. The pagarch was sometimes ordered to summon both the plaintiff and the defendant (literally: "gather [the plaintiff] and his companion" *ijma' bayna-hu wa-bayna šāḥibi-hi*) and examine their claims.<sup>33</sup> The principal subject of the letter appearing time and again concerns instances where the plaintiff is required to produce proof (*bayyina*) of the legitimacy of his claim. The exact timing of the presentation of this evidence

<sup>31</sup> P.Heid.Arab. I n°11 = Abū Šafya n°33.

<sup>32</sup> C.H. Becker, "Arabische Papyri des Aphroditofundes," 74-75 = Abū Šafya n°34.

<sup>33</sup> P.Heid.Arab. I n°10 = Abū Šafya n°32; C.H. Becker, "Arabische Papyri des Aphroditofundes," 74-75 = Abū Šafya n°34.

within a proceeding is not always mentioned.<sup>34</sup> When it is mentioned, the presentation of proof seems to vary from one letter to another. In certain papyri, recovery of the truth (*ḥaqq*) by means of evidence is supposed to occur during a confrontation between the plaintiff and the defendant:

Dāwūd b. Baddās has informed me [that the *māzū*]t of his village settled in his house with members of his family and some of his belongings, in an unjust manner [and without any right]. When the present letter reaches you, bring them together. If what [Dāwūd b. Baddās] told me is true (*ḥaqqan*), have [his adversary] give him back what he owes him.<sup>35</sup>

In this excerpt, the procedure conforms to the classical *fiqh* model where the confrontation between litigants before a judge precedes the exposition of proofs.<sup>36</sup> In other letters, however, the gathering of litigants follows the exposition of proofs:

As to the matter in hand. Yuḥannis b. Shanūda has informed me that Anbā Ṣalm, belonging to his district (*kūra*), has a debt of eighteen dinars toward him, and that he deprived him of his due. If what he told me is true (*ḥaqqan*) and if he produces a proof (*bayyina*) of it, summon him together with his adversary and have him give back what he owes him.<sup>37</sup>

In this type of instruction, the pagarch is ordered to preside over the production of proofs by the plaintiff. Only when the plaintiff's right has been established would the defendant be summoned and condemned.

The interpretation of this procedure depends on the way we consider these instructions. Two hypotheses may be proposed:

(1) These letters contain clear, succinct instructions containing sentences that correspond to the successive steps to be implemented. The assumption is that these instructions were to be complied with in literal terms. In certain cases, the production of the proof by the plaintiff preceded his confrontation with the defendant. If the plaintiff could not prove his right before the pagarch, the defendant would not be summoned to court. In other cases, the pagarch is asked to summon the two litigants first and the plaintiff is required to produce his proof during this confrontation. The number of surviving judiciary papyri is too few, however, to expound further on this hypothesis. Could these procedures have been changed to suit the nature of the dispute or the litigants' identity (especially that of the defendant)? The evidence is too scant to allow for a satisfactory answer. The only available consideration therefore is to allow for certain variability within a procedure so that the gathering of litigants before a judge is not regarded as a precondition to the production of the proof thereof, as in classical *fiqh*.<sup>38</sup>

<sup>34</sup> See e.g. P.Cair.Arab. III n°154 = Abū Ṣafya n°28 = Grohmann, *Arabic Papyri*, 129; P.Qurra n°3 = Abū Ṣafya n°31.

<sup>35</sup> C.H. Becker, "Arabische Papyri des Aphroditofundes," 74-75 = Abū Ṣafya n°34.

<sup>36</sup> On the necessary presence of the two litigants before the judge in classical Islamic law, see J. Schacht, *Introduction au droit musulman* (Paris: Maisonneuve et Larose, 1983), 157; E. Tyan, "La procédure du "défaut" en droit musulman," *Studia Islamica* 7 (1957), 119.

<sup>37</sup> P.Heid.Arab. I n°10 = Abū Ṣafya n°32. See also P.Heid.Arab. I n°11 = Abū Ṣafya n°33.

<sup>38</sup> There were however exceptions to this rule in classical *fiqh*. For the Shāfi'īs, the defendant's appearance at court is not required (E. Tyan, "La procédure du "défaut"," 118-9). Moreover, in Ḥanafī law, the plaintiff must



(2) The order of the procedure (appearance of both litigants → proof; or proof → appearance of the defendant) is not the main preoccupation of the governor. The assumption here is that the order of sentences in Qurra b. Sharīk's letters do not reflect the precise steps to be followed by the pagarch. What then is the principal object?

With only a few exceptions, the most recurring topic of Qurra's judicial letters is the production of proof, called "*bayyina*". This word (pl. *bayyināt*) occurs 71 times in the Qur'ān – 19 times in the singular, and 52 times in the plural.<sup>39</sup> It always designates the "manifest proof"<sup>40</sup>, the "irrefutable proof"<sup>41</sup> or the archetypal "Proof"<sup>42</sup> produced by God of His existence and of the veracity of His prophets – e.g. the scriptural proof of the Qur'ān and its verses.<sup>43</sup> In pre-classical and classical *fiqh*, "*bayyina*" came to designate the principal type of judicial proofs – the testimonial evidence of two (or four in case of fornication) reliable witnesses.<sup>44</sup> However, although the Qur'ān mentions statements by two witnesses,<sup>45</sup> it never refers to their testimony as "*bayyina*". The word "*bayyina*" appears to signify "evidence" without referring to any specific procedure.

Between the revelation or the collection of the Qur'ān around the middle of the seventh century CE and the composition of the first *fiqh* books a century later, an apparent terminological transformation occurred. At some point during this century, the word "*bayyina*" came to mean a "double reliable testimony regarded as evidence." Qurra b. Sharīk's letters, which were written halfway through this particular period, do not state the governor's precise intention for employing this word. He only asks that the plaintiff "produces the proof of [his claim]" (*aqāma l-bayyina 'alā mā akhbara-nī / aqāma 'alā dhālika l-bayyina*). Was he referring to the testimony of two reliable witnesses? Or was he demanding for "irrefutable proofs", irrespective of the precise nature of these proofs?

A definitive answer to these questions cannot be supplied.<sup>46</sup> Evidences found in papyri cannot be sufficiently substantiated, and later narrative sources are no better at elucidating the

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produce witnesses and begin to prove his claim before the summoning of the defendant if the latter lives at a distance superior to half a day's journey from the court. Al-Khaṣṣāf, *Adab al-qāḍī*, ed. Farḥāt Ziyāda (Cairo: The American University in Cairo Press, 1978), 250. Cf. Ibn al-Qāṣṣ, *Adab al-qāḍī*, ed. Aḥmad Farīd al-Mazīdī (Beirut: Dār al-kutub al-'ilmiyya, 2007), 110. On this procedure, see M. Tillier, *Les cadis d'Iraq et l'État abbasside (132/750-334/945)* (Damascus: Institut Français du Proche-Orient, 2009), 297-8. Could this procedure be a relic from the previous Umayyad procedure?

<sup>39</sup> M.F. 'Abd al-Bāqī, *al-Mu'jam al-mufahras li-alfāz al-Qur'ān al-karīm* (Damascus-Beirut: Maktabat al-Ghazālī-Mu'assasat manāhil al-'irfān, s.d.), 142-3.

<sup>40</sup> R. Brunschvig, "Le système de la preuve en droit musulman," in *Études d'islamologie* (Paris: Maisonneuve et Larose, 1976), 202; *id.*, "Bayyina," in *IEP*, 1: 1150.

<sup>41</sup> cf. the French translation by Denise Masson in *Essai d'interprétation du Coran inimitable* (Beirut: Dār al-kitāb al-lubnānī, s.d.), 78.

<sup>42</sup> Cf. the French translation by R. Blachère, *Le Coran* (Paris: Maisonneuve et Larose, 2005), 87.

<sup>43</sup> See al-Ṭabarī, *Jāmi' al-bayān fī ta'wīl al-Qur'ān*, ed. Maḥmūd Muḥammad Shākir (Beirut: Mu'assasat al-risāla, 2000), 10: 242.

<sup>44</sup> R. Brunschvig, "Le système de la preuve," 201 *sq.*

<sup>45</sup> See e.g. Qur'ān, 5:106-7.

<sup>46</sup> We must remark that in P.Qurra n° 3 = Abū Ṣafya n°31, "*bayyina*" is used once in the singular and another time in the plural (*bayyināt*). The plural form of the word would not make sense if *bayyina* meant double (or multiple) testimony. We could therefore conclude that this plural simply means "evidences" in general. However, Abū Ṣafya prefers to read "*sha'na-hu*" in lieu of "*bayyināti-hi*" (this reading is mentioned by Nabia Abbott in her edition of the papyrus); in such a case the plural form would hold no significance.

intentions of an Egyptian governor or what he expected from a Coptic pagarch. We can however formulate three premises:

(1) Qurra b. Sharīk's letters are the oldest documents using the word "*bayyina*" in a judicial sense. Whatever its precise meaning, the repetition of this word in the governor's letters suggests that the "classical" judicial terminology was in the process of becoming fixed in the early eighth century CE, especially vocabulary pertaining to evidences.

(2) The word "*bayyina*" clearly belongs to rhetoric based on the Qur'ān. Although "*bayyina*" may have been terminology used to designate judicial proofs before Islam, I have been unable to find any epigraphic or literary (i.e. poetical) evidence of such terminological use.<sup>47</sup> Even if this were the case, the high number of occurrences of this word in the Qur'ān gave it undoubtedly a religious connotation. Other Arabic words could have been used to refer to "proof", like *hujja*, *dalīl*, or *burhān*<sup>48</sup>. These appear also in the Qur'ān ("*hujja*" is mentioned four times, "*dalīl*" once and "*burhān*" eight times<sup>49</sup>), but to a much lesser extent than the word "*bayyina*". Furthermore, they connote inferior types of proof relating to human reasoning or to bare arguments that can be refuted.<sup>50</sup> In choosing the word "*bayyina*" which occupied a prominent position within the Qur'ān over other synonymous terminology, the governor was decidedly prescribing judicial procedures within a qur'ānic frame of reference.<sup>51</sup>

(3) Given the central character of the word "*bayyina*" in Qurra b. Sharīk's letters and its near-systematic appearance replete with religious connotations, the production of proofs could be one of the main reasons for the writing these letters. In other words, the governor of Fustāt may have required pagarchs to implement a procedure relying on specific mode of evidence, the *bayyina*, presumably as a kind of testimonial proof produced by a certain number of witnesses.

### *Conditional judgement*

There is more to Qurra b. Sharīk's letters than instructions concerning the appearance of litigants or prescribing judicial procedure such as the *bayyina*. The correspondence contains detailed instructions about verdicts. If the plaintiff succeeds in substantiating his claim by means of a *bayyina*, the pagarch is ordered to condemn the defendant. The verdict is a rational outcome in that the production of a proof leads to the sentencing. Despite their apparent banality, instructions regarding verdicts carry great significance. First, the existence of a verdict implies that the pagarch's judgment is based on the *bayyina*. This is an indication that the

<sup>47</sup> The term *bayyina* is absent from the vocabulary of the *Mu'allaqāt* compared to other terms relating to the law of evidence (*shāhid*, *yamīn*, *ḥakam*, *ʿadl*, *khaṣm*, *qaḍā*, *ḥalafa*, etc.) . See Albert Arazi and Salman Masalha, *Six Early Arab Poets. New Edition and Concordance* (Jerusalem: The Max Schloessinger Memorial Series, 1999), index.

<sup>48</sup> R. Brunschvig, "Bayyina," in *EP*, 1: 1150.

<sup>49</sup> M.F. ʿAbd al-Bāqī, *al-Muʿjam al-mufahras*, 118, 194, 261.

<sup>50</sup> The word "*hujja*" is associated with God in the Qur'ān (6:149), but the adjective "*bāligha*" (decisive) is required to instil the sense of "absolute proof". See L. Gardet, "Ḥudjdja," in *EP*, 3: 543. The word "*dalīl*" appears in the Qur'ān (25:45) meaning "guide". As for "*burhān*", it is a more ambiguous word which can designate, in the Qur'ān, both decisive proof revealed by God and evidence men are asked to produce regarding the truthfulness of their beliefs. L. Gardet, "Burhān," in *EP*, 1: 1326.

<sup>51</sup> On similar examples of "qur'ānicization" of the discourse which occurred under the Umayyads, see F.M. Donner, "Qur'ānicization of Religio-Political Discourse in the Umayyad Period," *Revue des Mondes Musulmans et de la Méditerranée* 129 (2011), 79-92.

*bayyina* prescribed by the governor was binding, and that the pagarch would only have issued a judgement on the basis of this proof. Second, the entire proceeding is executed as if the governor was himself issuing conditional judgment. He did not receive the litigants, nor record any proofs thereof, so could not have acted as a judge himself. Nevertheless, he dictated his verdict to the pagarch who fulfils this role on his behalf.

That the governor is an important judicial authority is indicated in several of the letters, in sentences immediately preceding the final salutation. If the plaintiff cannot prove his claim, the governor orders the pagarch to inform this fact to him in writing (*illā an yakūna sha'nu-hu ghayra dhālika fa-taktubu ilayya bi-hi*).<sup>52</sup> At a first glance, Qurra b. Sharīk appears to be requesting to be kept abreast of a certain case,<sup>53</sup> but this is not at all so. These instructions can only be understood if taken as part of a binary construction. If the plaintiff produces a *bayyina*, the pagarch must issue a judgment. On the other hand, if the plaintiff fails to prove his claim, the pagarch is required to write to the governor. In other words, the pagarch *must not issue any judgment* without the *bayyina*; he only has to consult the governor. What next? Will the governor issue new instructions on the basis of the pagarch's report? Or will he impose another mode of proof (e.g. an oath, if we assume *bayyina* to be a double testimony)? Will he ask the defendant to produce evidence? Will he send new instructions to the pagarch regarding the verdict? There is nothing noteworthy in the Egyptian documents to answer these questions. What is clear, however, is that the governor of Fustāṭ constituted a significant part of the judicial authority delegated to the pagarch.

### 3. Islamic referent in a Christian context: the role of the governor in a “provincial” procedure

These pieces of information offer clues about the role of the governor and his administration within “provincial” legal proceedings – a procedure implemented outside Fustāṭ – and the judicial relationship between governors and Coptic authorities. Let us summarise the general flow of these proceedings. Individuals residing outside Fustāṭ raise their cases with the governor either by means of a direct petition or by seeking an audience with him. The governor writes to the pagarch of the plaintiff's *kūra* a letter informing him of the plaintiff's identity and the basis of the complaint, and orders him to judge the case. He prescribes a procedure that includes at one stage a confrontation between the litigants in addition to the production of specific evidence, called the *bayyina*, by the plaintiff. If the plaintiff produces a *bayyina*, the pagarch must issue a judgement restoring the disputed item to the plaintiff.<sup>54</sup> Where such proof is not produced, the pagarch is obliged to write to the governor, possibly to seek new instructions.

These letters suggest that governors had taken steps to centralise the Egyptian judiciary. In Qurra's case, he wished to appear as guarantor of justice, as in the recurring formula “*fa-lā*

<sup>52</sup> See references *supra*.

<sup>53</sup> This is for instance Steinwenter's interpretation of the sentences. A. Steinwenter, *Studien zu den koptischen Rechtsurkunden aus Oberägypten* (Amsterdam: Verlag Adof M. Hakkert, 1967 [1<sup>st</sup> ed. 1920]), 15.

<sup>54</sup> The governor's instructions occasionally exceeded the level of bare restitution. In C.H. Becker, “Arabische Papyri des Aphroditofundes,” 74-75 = Abū Šafya n°34, Qurra b. Sharīk orders the pagarch to chase away “by force” (*dahran shadīdan*) an illegal occupier of a house. Here restitution is associated with a kind of physical punishment of the defendant.

*yuzlamanna 'inda-ka*” (“Do not let [the plaintiff] be unjustly treated before you”).<sup>55</sup> His role was not merely symbolic, however. Qurra also imposed procedures which, by their qur’ānic vocabulary, may have been identified as Islamic. Furthermore, he dictated his verdict to the pagarch or, at least, claimed higher judicial authority to whom the pagarch was accountable. In early eighth-century Upper Egypt, justice was still dispensed by Christian pagarchs. However, Qurra b. Sharīk’s letters indicate that these proceedings had been integrated into an Islamic framework.<sup>56</sup>

It is not yet clear why Christian litigants referred their matters to the Muslim governor. Does this mean that these litigants did not refer them directly to their pagarch? Three hypotheses may be considered:

(1) The plaintiff had already referred the matter to the pagarch. The pagarch issued a judgment but the plaintiff, unhappy with the outcome, chose to appeal the case with the governor. In Byzantine Egypt, appealing to the governor about decisions issued by local judges was a widespread practice.<sup>57</sup> In her study of some Qurra papyri, Nabia Abbott seems to adhere to this interpretation of the procedure.<sup>58</sup> Abbott’s hypothesis – that the governor acted as genuine appeal court against the pagarch’s decision – contradicts however with my previous assertion regarding the meaning of the expression “*ghalaba 'alā ḥaqqi-hi*” (see *supra*). For the sake of discussion, let us consider nevertheless that my previous demonstration failed to prove the non-existence of any previous lawsuit before the pagarch, and that in reality the plaintiff appealed to the governor. This in no way implies that the governor *presided* over appeal proceedings; he did not personally receive the defendant but ordered the pagarch to conduct the trial and issue a judgment. Moreover, Qurra b. Sharīk’s letters do not mention any injustice committed by the pagarch, nor any reference to judgments quashed by the governor. What would the appeal be about, then? The centrality of the *bayyina* in these letters may offer a clue. One possibility may be that the plaintiff complained before the governor about a procedure implemented by the pagarch, in particular about certain proofs being used as basis of his judgment. This could explain why the governor ordered the pagarch to rely on specific proof, the *bayyina*. However this explanation does not fit with the minority of judicial papyri without any mention of the word “*bayyina*”.<sup>59</sup> Here, the hypothesis that the governor-pagarch communications related to an appeal to the governor against a previous judgment falls short.

(2) The plaintiff filed a complaint against his adversary before the pagarch of his district, but the pagarch failed to take up the case and the plaintiff decided to petition the matter directly with the governor. This implies that the plaintiff appealed to the governor against what he

<sup>55</sup> See references above.

<sup>56</sup> The implementation of this procedure implicating both a Muslim governor and Christian pagarchs makes it necessary to review some of Gladys Frantz-Murphy’s interpretations relying on the hypothesis of the disappearance of courts in late Byzantine Egypt. Frantz-Murphy considers the Muslim authorities as being responsible for the restoration of an efficient judicial system in Islamic Egypt (G. Frantz-Murphy, “Settlement of Property Disputes,” 101; she contradicts herself a few lines later, however, in 102, by suggesting that Coptic judges still existed in the second/eight century). The hypothesis of an extinction of courts in Byzantine Egypt before the Arab conquest has since then been refuted by D. Simon, cited by T. Gagos and P. van Minnen, *Settling a Dispute. Toward a Legal Anthropology of Late Antique Egypt* (Ann Arbor: The University of Michigan Press, 1994), 42.

<sup>57</sup> See G. Rouillard, *L’administration civile de l’Égypte byzantine* (Paris: Geuthner, 1928), 60.

<sup>58</sup> N. Abbott, *The Qurra Papyri*, 74, 99.

<sup>59</sup> See e.g. C.H. Becker, “Arabische Papyri des Aphroditofundes,” 74-75 = Abū Ṣafya n°34.

regarded as an abuse of power, as suggested by Steinwenter's interpretation.<sup>60</sup> However Qurra b. Sharīk's judicial letters do not mention the pagarch rejecting a previously filed complaint. In a Greek letter to Basilios, Qurra reproaches him for his lack of attention to the needs of the people, and he enjoins him to be more just.<sup>61</sup> According to J. Abū Šafya, this letter rebukes the pagarch's judicial practice, stating that Basilios neither heard the complaints of his people nor judged them accordingly.<sup>62</sup> Abū Šafya's interpretation is questionable, however, since the letter in question concerns mainly taxes and fiscal abuses committed by tax collectors. It is true that Qurra b. Sharīk urges Basilios to be more "just" and listen carefully to the complaints of his people, but the justice at stake here is a fiscal one, not one between private litigants. Appeals to the *dux* of Thebaide – or even to the Byzantine emperor himself – against judicial abuses committed by the pagarch of Aphroditō or his employees were commonplace during the sixth century CE.<sup>63</sup> Under the Umayyads, however, no serious evidence allows us to conclude that appeals to governors arose from the denial of justice. Furthermore, the standardised form of judicial letters and their frequency – Qurra b. Sharīk's letters were written during a period of a little more than one year – do not suggest that they were related to occasional abuses, but written as part of a more standard procedure.

(3) Either the plaintiff had not filed a complaint with the pagarch, or the claim was filed and the pagarch immediately dispatched him to the governor of Fustāt. This means that the complaint before the governor was part of the first instance procedure. According to this procedure, a plaintiff living far from Fustāt referred his case to the governor or his administration. The case was then referred to the pagarch in a letter prescribing the judicial procedure including conditional judgment. If this scenario is true, the governor's letter was a precondition to the examination of a dispute by the pagarch. This hypothesis, which appears as the most plausible, suggests that the governor not only was informed of the pagarchies' legal matters but exercised actual authority over them.

This scenario is strongly comparable to certain procedures dating from late Antiquity. From the fourth century CE onward, local judges of the Roman Empire could only adjudicate minor litigations concerning small amounts of money; major cases had to be referred to the governor.<sup>64</sup> Moreover, Constantin Zuckerman noticed the importance of a procedure by rescripts in sixth-century Egypt. A plaintiff sent a petition to the Emperor in the first instance, in which he explained his case. The Emperor – or rather his administration – sent a rescript to the *dux* of Thebaide, in which he ordered him to hear the complaint and to dispense a judgment in favour of the plaintiff. These rescripts were enforceable only after the *dux* had conducted a proper trial, in the presence of both litigants, and after the facts mentioned by the plaintiff in his petition had been verified.<sup>65</sup> Jill Harries also notes that from the fifth century onward a specific procedure

<sup>60</sup> A. Steinwenter, *Studien zu den koptischen Rechtsurkunden*, 15.

<sup>61</sup> Papyrus n°1356, translated into English by H.I. Bell, "Translations of the Greek Aphroditō Papyri in the British Museum, Part 1," *Der Islam* 2 (1911), 281-2; Arabic translation by J. Abū Šafya, *Bardiyyāt Qurra*, 229-30.

<sup>62</sup> J. Abū Šafya, *Bardiyyāt Qurra*, 109.

<sup>63</sup> H.I. Bell, "An Egyptian Village in the Age of Justinian," *The Journal of Hellenic Studies* 64 (1944), 31, 33, 35.

<sup>64</sup> J. Harries, *Law and Empire in Late Antiquity* (Cambridge: Cambridge University Press, 1999), p. 54.

<sup>65</sup> C. Zuckerman, "Les deux Dioscore d'Aphroditē ou les limites de la pétition," in Denis Feissel and Jean Gascou, eds., *La pétition à Byzance* (Paris: Centre d'Histoire et Civilisation de Byzance, 2004), 83-84. Cf. H.I.

developed in which a petitioner addressed the office of the governor through a *libellus* in which the plaintiff described his adversary and the dispute.<sup>66</sup> The rescript issued by the governor did not judge the truthfulness of the facts, but rather exposed a rule pertinent to the case and authorised the plaintiff to refer his dispute before a judge (*iudex*).<sup>67</sup> The governor could send the rescript to the claimant or directly to the local officer in charge of adjudicating similar disputes.<sup>68</sup>

The similarity between the procedure by rescript in Byzantine Egypt and the procedure revealed by Qurra b. Sharīk's letters is striking. It is thus tempting to conclude that early eighth-century Egyptian judicial administration originated in part from late Roman-Byzantine procedures. It appears as if the *libelli* previously sent to Constantinople, or increasingly to the *dux*, were still in use at Aphroditō under early Islamic rule. Like the Emperor or the *dux*, the governor of Fustāt sent rescripts – i.e. surviving judicial letters – to pagarchs whenever he received a complaint. These rescripts prescribed the procedure to be followed and issued conditional judgments.

Does this indicate that the procedure was complied with systematically and that the proceedings could only be opened once the plaintiff had sent a petition to the governor? This is certainly not the case. The people of Aphroditō could still go directly to the pagarch's court, as had been the case in the late seventh century CE.<sup>69</sup> The high sums mentioned in Qurra's letters suggest that only the most expensive disputes were referred to the governor, and that cases involving insignificant sums were referred to pagarchs without the matter being raised before the governor. Does this mean that litigations about large sums of money *had* to be referred to the governor's administration and that judgements could only be issued subsequent to the governor's authorisations and instructions? In other words, did the governors of Fustāt impose such procedure by rescripts? It is possible that at first, the Coptic people simply kept their former habit of sending petitions to their rulers – the *dux*, or the governor, whatever his religion – to ensure their disputes would merit more scrutiny by the pagarch,<sup>70</sup> especially in case high-value disputes. If this last hypothesis is true, the governors of Fustāt adopted this procedure as a way of dealing with constant inflow of new petitions. Even if they did not impose it – or not at first –, this procedure allowed the governors to establish control over a provincial, Christian judicial institution and to develop or promote “Islamic”<sup>71</sup> procedures that eventually evolved into the classical model theorised by *fiqh* books a century later.

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Bell, “An Egyptian Village,” 26. See also J. Harries, *Law and Empire in Late Antiquity*, 184; T. Gagos and P. van Minnen, *Settling a Dispute*, 10-15 (however, this last example of petition is not judicial in nature).

<sup>66</sup> About the Roman concept of *libellus*, see A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: The American Philosophical Society, 1954), 561.

<sup>67</sup> J. Harries, *Law and Empire*, 27, 104-105.

<sup>68</sup> C. Humfress, *Orthodoxy and the Courts*, p. 42. However Arthur Schiller questions the classification of “rescript” of most Egyptian Byzantine papyri which are usually identified as such. A. Schiller, “The Courts are No More,” in *Studi in onore di Edoardo Volterra* (Casa editrice dott. A. Giuffrè, 1971), 1: 477-82.

<sup>69</sup> See for example P.Apoll. n°37.

<sup>70</sup> See G. Frantz-Murphy, “Settlement of Property Disputes in Provincial Egypt: the Reinstitution of Courts in the Early Islamic Period,” *al-Masāq* 6 (1993), 103.

<sup>71</sup> By “Islamic”, I simply mean that these procedures were being enacted by Muslim governors within a qur’ānic conceptual framework. For lack of evidence and details about the procedure prescribed by governors, it is however difficult to comment further on their provenance.

## Conclusion

The exact nature of judicial procedures implemented by the governor of Fustāt remains uncertain until more evidence is discovered. Among the various hypotheses described above, some seem more consistent than others. It is likely that raising the case first and foremost with the governor was a normal judicial procedure in the Christian landscape, one that adhered to the format of previous Byzantine procedures.

This by no means undermines the originality of the process which led to the development of classical Islamic procedures. By adopting a judicial procedure in which Christian litigants referred to him as first port of call (probably by way of petitions), Egyptian governors like Qurra b. Sharīk could gain control over local judicial practices. Although he did not dispense justice himself amongst the Christian people of Upper Egypt, the governor could also impose rules of procedures, or at least reinterpret them within an Islamic framework characterised by the use of a qur'ānic terminology.

This suggests that the judicial system served the Muslims to increase their authority within the Egyptian landscape. Earlier documentary evidence demonstrates that the Christian *dux* was still regarded as superior judicial authority under the Sufyānids (second half of the seventh century)<sup>72</sup> and that he could send his judicial instructions to the pagarch. Institutionally speaking, the Egyptian landscape therefore remained only loosely connected to the Muslim rule. In the early eighth century, however, the governor of Fustāt emerged as the highest legal authority within the province. Even though disputes were still being adjudicated by Christian pagarchs, the development of a judicial hierarchy presided over by the Muslim governor integrated the traditional institutions of conflict resolution into a more structured state. The emergence of a new judicial order appears to have undermined the rule of Christian authorities and eventually led to their disappearance. By regularly submitting their complaints to the governor of Fustāt, Christians became accustomed to the main principles of an “Islamic” justice as guaranteed by Muslim authorities. Once this process was achieved one or two decades later, the governor of Fustāt successfully replaced traditional pagarchs with Muslim sub-governors.<sup>73</sup> Christian judicial institutions became marginalised and mainly survived within episcopal courts. Thus, despite remaining a majority for centuries, the Christian populace became a submissive minority at least on an institutional level.

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<sup>72</sup> R. Rémondon, *Papyrus grecs d'Apollônios Anô*, 24.

<sup>73</sup> Cf. P. Sijpesteijn, “Landholding Patterns in Early Islamic Egypt,” 127.

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